

REPLY TO: James C. Gulick
Environmental Division
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Telephone: 919/716-6600
Fax: 919/716-6767

September 15, 2003

Representative Jean Preston
603 Legislative Office Building
Raleigh, NC 27603-5925

Re: Advisory Opinion concerning ownership of dredged fill and accretions on Bogue Banks at Bogue Inlet; N.C. Gen. Stat. §§ 146-6.

Dear Representative Preston:

You ask several hypothetical questions relating to ownership of land that might be created by dredging fill and accretion on Bogue Banks at Bogue Inlet. The questions pose different actions the Town of Emerald Isle hypothetically might take in relation to its effort to move the navigational channel in Bogue Inlet from its current location directly next to Bogue Banks toward the middle of the inlet approximately 3000 linear feet west of Bogue Banks (Emerald Isle) and approximately 4,000 linear feet east of Bear Island. The Town proposes to block the old navigational channel and to stabilize the inlet shoreline at Emerald Isle.

The Town contemplates blocking off (damming up) the old channel with a large sand deposit of dredged material inland (i.e., North) of the area of the western tip of Bogue Banks adjacent to a large sand spit that has formed there. The Town wants to assure that beaches created by its dredging and nourishment project, including any beach that is expected to be formed along the existing channel's shoreline, will remain undeveloped public beaches vested in the State of North Carolina. In a conversation with the Town Manager after receiving your request, we ascertained that the Town's primary concern is an area of channel shoreline where a number of houses in the Town of Emerald Isle are threatened by the channel's eastward erosion. This area is inland of

the COLREGS Demarcation Line,¹ but well seaward (i.e., South) of the proposed dam. You ask specifically:

Question 1: If the Town's blocking off the old navigational channel in the manner described were to cause significant accretion along the old (existing) channel's shoreline on Bogue Banks at Emerald Isle, would the accretion be owned by:

- A. The current owner of the upland property pursuant to N.C. Gen. Stat. § 146-6(a) ; or
- B. The prior owner of property that has already completely eroded away prior to the dredging project;
- C. The State of North Carolina in trust for the public pursuant to N.C. Gen. Stat. § 146-6(f) ["land in or immediately along the Atlantic Ocean"] or N.C. Gen. Stat. § 146-6(a) ?

In our opinion, both our statutory and case law would make the current owner of the upland property the owner of the newly accreted land. Pursuant to N.C. Gen. Stat. § 146-6(a), "If any land is, by any process of nature. . . , raised above the high watermark of any navigable water, title thereto shall vest in the owner of that land which, immediately prior to the raising of the land in question, directly adjoined the navigable water." "'Accretion' denotes the act of depositing, by gradual process, of solid material in such a manner as to cause that to become dry land which was before covered with water." *State v. Johnston*, 278 N.C. 126, 146, 179 S.E.2d 371, 384 (1971). It is a "process of nature."

The State would not acquire any interest in the accreted land because N.C. Gen.

¹ The COLREGS Demarcation Line is a useful tool in determining where the Ocean shoreline ends and the channel, or inlet, shoreline begins. It is the same as the baseline of the State's territorial sea, which is determined according to the International Convention on the Territorial Sea and the Contiguous Zone. *United States v. California*, 381 U.S. 139 (1965). This line has been located at Bogue Inlet according to the International Regulations for Preventing Collisions at Sea, commonly known as "COLREGS," pursuant to 33 U.S.C. §§ 1601, et seq."

Stat § 146-6(f) is inapplicable to the hypothetical question posed for two reasons. First, subsection (f) does not apply to lands raised by accretion. Rather in our opinion, it applies only where the new land is raised above the mean high water mark by direct deposit by man of dredging fill or spoil on the shore.

Second, subsection (f) explicitly applies only to the title to land "in or immediately along the Atlantic Ocean." This hypothetical question, like those remaining, assumes that the deposition at issue is on the channel shoreline, as distinguished from the shore in or immediately along the Atlantic Ocean.

Finally, the title of the previous owner, whose property had been completely washed away by erosion, was extinguished; it is not he, but the current owner, who would own the newly accreted land. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970).

Question 2: If the Town were to directly place a portion of the dredged material along the old (existing) channel shoreline (i.e., beside the threatened homes) in Emerald Isle, thereby creating a small strip of land along that shoreline above the mean high water mark, would that newly created shoreline vest in the State?

Once again the answer is no. N.C. Gen. Stat § 146-6(f) is inapplicable again because the channel shoreline about which the Town is concerned is not "immediately along the Atlantic Ocean." Instead, N.C. Gen. Stat. § 146-6(d) provides the answer. That section provides in pertinent part:

"[I]f in any process of dredging, by either the State or federal government, for the purpose of deepening any harbor or inland waterway, or clearing out or creating the same, a deposit of the excavated material is made upon the lands of any owner, and title to which at the time is not vested in either the State or federal government, or any other person, whether such excavation be deposited with or without the approval of the owner or owners of such lands, all such additions to lands shall accrue to the use and benefit of the owner or owners of the land or lands on which such deposit shall have been made, and such owner or owners shall be deemed vested in fee simple with title to the same."

Thus, title to the raised lands would vest in the adjacent upland owner in accordance with N.C. Gen. Stat. § 146-6(d). The fact the Town, rather than the State directly, finances and conducts the dredging and filling makes no difference. The Town is a political subdivision of the State and, in our opinion, the legislature did not intend that the State would have greater rights if the Town, rather than the State, financed the project. Any accretion to those raised lands would vest in the owner of the raised lands, not the State, per N.C. Gen. Stat § 146-6(a).

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Your third question contemplates that the title to the newly raised land in one or both of the first two questions would vest in the State. As neither of the methods described in Questions 1 or 2 would vest title in the State, this question is moot and we do not address it.

Question 4: Assuming that neither of the methods described in Questions 1 and 2 would vest title to the newly raised land in the State, can you identify any appropriate mechanism, either at the State or local level, that can be implemented to insure that no development of newly raised land at the channel shoreline of Bogue Inlet at Emerald Isle can occur?

The newly raised lands would be within the Inlet Hazard Area of Environmental Concern designated by the Coastal Resources Commission in 15A N.C. Admin. Code 7H.0304(3) under the authority of the Coastal Area Management Act, N.C. Gen. Stat. §§ 113A-100, *et seq.* ("CAMA"). Therefore, any development must be consistent with CAMA permitting requirements. Additional protections against development could be obtained by obtaining from the upland owners the dedication of a conservation easement to the Town, in exchange for the deposition of fill materials on their lots.

If the dredged spoil material were used to create an *island* in the old channel, that island would belong to the State. "If an island is, by any process of nature or by act of man, formed in any navigable water, title to such island shall vest in the State and the island shall become a part of the vacant and unappropriated lands of the State." N.C. Gen. Stat. 146-6(d). Were the island by accretion then to become connected to privately owned property along the inlet shoreline, the State would retain its interest in what had been the island. The boundary line would be located at the point where the State-owned island and the private uplands eventually join. *State v. Johnston*, 278 N.C. at 146-147, 179 S.E.2d at 384. This, of course, could be an expensive operation with an uncertain outcome, depending as it would on accretion.

Please note that this opinion does not address what permits or other approvals may be required for this project. We trust this Advisory Opinion is helpful to you and the Town.

Sincerely,

James C. Gulick
Senior Deputy Attorney General

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J. Allen Jernigan
Special Deputy Attorney General



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
WILMINGTON DISTRICT, CORPS OF ENGINEERS
P.O. BOX 1890
WILMINGTON, NORTH CAROLINA 28402-1890

October 15, 2003

Regulatory Division

Action ID No. 200100632

OCT 20 2003

4500.02

LK, EH

Mr. Ron Sechler
National Oceanic Atmospheric Administration Fisheries
101 Pivers Island Road
Beaufort, North Carolina 28516

Dear Mr. Sechler:

Please reference the Town of Emerald Isle's proposal to pursue Department of the Army authorization for the relocation of Bogue Inlet Channel between Emerald Isle and Hammocks Beach State Park (Bear Island) to protect residential homes and town infrastructures, and to place the dredged material on approximately 4.0 miles of beach for nourishment. Also, reference your August 8, 2003 letter concerning the revision of the Essential Fish Habitat (EFH) assessment.

Enclosed you will find a modified Essential Fish Habitat assessment as it pertains to your August commenting letter. In order to comply with the EFH regulations (50 CFR Section 600.920) and the Magnuson-Stevens Fishery Conservation and Management Act (Section 305[b][4][B]) and to satisfy Federal NEPA requirements, we are requesting that you review this document and provide any additional recommendations and comments within 30 days from the receipt of this letter.

Thank you for your attention to this matter. Should you have any questions, please contact Mr. Mickey Sugg at telephone (910) 251-4636.

Sincerely,

Keith A. Harris, Chief
Wilmington Regulatory Field Office

Enclosure

Copies furnished (w/o enclosure):

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Coastal Planning & Engineering
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Mr. Doug Huggett
Division of Coastal Management
North Carolina Department of Environment
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Mr. Andreas Mager, Jr.
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Ms. Tere Barrett
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North Carolina Department of
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Mayor Art Schools
Town of Emerald Isle
7500 Emerald Drive
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Mr. Frank Rush
Town of Emerald Isle
7500 Emerald Drive
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Town of Emerald Isle

Mayor
Arthur B. Schools, Jr.

Mayor Pro-Tem
Patricia McElraft

Board of Commissioners
Richard Eckhardt
Emily Farmer
Dorothy Marks
Floyd Messer



Town Manager
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Visit our web site at www.emeraldisle-nc.org !

October 20, 2003

Mr. Larry D. Almond
1120 Baron Road
Waxhaw, NC 28173

RE: Special Meeting of Property Owners from The Point to Discuss Bogue Inlet Channel Relocation
Saturday, November 15, 2003, 10:00 am, Emerald Isle Town Hall

Dear Mr. Almond:

The Town of Emerald Isle is vigorously pursuing a project to relocate the main tidal channel in Bogue Inlet away from existing homes at The Point to a location approximately 3,000 ft. west of its current location. This new location would place the main tidal channel approximately halfway between Emerald Isle and Bear Island, and based on historical migration patterns, should provide at least 15 years of relief from erosion in The Point neighborhood.

The Town and its consultants, Coastal Planning & Engineering, are preparing to issue the formal Draft Environmental Impact Statement for public review in November. This marks the start of the formal Federal and State review processes, which we hope will culminate in the issuance of all necessary permits by August 2004. The Town intends to begin dredging the new inlet channel in November 2004 and complete all necessary work, including placement of the dredge spoils on 4 miles of oceanfront beach, by March 2005.

The Town has been working closely with a "Project Development Team", or "PDT", to prepare the Draft Environmental Impact Statement for over a year now. This process has allowed concerned parties to express concerns upfront and has allowed the Town to address these concerns on the "front end" of the project design rather than the "back end". Overall, we are pleased with this approach, and are hopeful it will result in a smoother formal review process over the next year. Two critical issues that have not yet been resolved are: 1) the ownership of any new land that accretes adjacent to the existing properties at The Point, and 2) the management of any new land that accretes in this area. The Town needs your input and cooperation to resolve these issues over the next two months so that appropriate plans can be included in the Final Environmental Impact Statement that is scheduled to be issued early next year.

As currently envisioned, the Bogue Inlet project will result in the creation of a new main tidal channel approximately 3,000 feet west of the current main channel. The project would involve the removal of approximately 1,000,000 cubic yards of sand from the new channel. Approximately 200,000 cubic yards of this material would be used to construct a dike across the existing channel in a location near the western terminus of the existing sand spit northwest of The Point neighborhood (map enclosed). The remaining 800,000 cubic yards would be used to nourish approximately 4.0 miles of oceanfront beach in western Emerald Isle. This dike is a key component of the overall project, and would

help to divert the majority of inlet flows through the new channel. Experts involved with the development of this project agree that the creation of the new channel and the construction of this dike should result in a natural filling of the existing main tidal channel, and that the western end of Emerald Isle (directly adjacent to The Point neighborhood) will re-form as a long sand spit feature similar to that which was present in the 1980s and early 1990s. The NC Attorney General's Office has issued an advisory opinion (attached) that any new sand that accretes in this area as a result of this project will be owned by the directly adjacent property owner. Depending on the exact location of your property and the current water line, this means that any new land that forms will most likely be owned by you and your neighbors.

The PDT, including the Federal and State permitting agencies, has expressed concern that there may be interest in developing this new land at some time in the future if this new land stabilizes over time. The PDT has also indicated that the new land will need to be effectively managed by the Town, State, or some other entity to preserve the new environmental habitat that forms in this area. A likely outcome of the permitting process is that there will need to be adequate legal assurances that: 1) any new land that accretes will never be developed, and 2) that the Town, State, or some other entity will manage this new habitat in an environmentally sound manner.

The Town has made it a priority to develop a cooperative relationship with the PDT members, and seeks to address these concerns in a cooperative and equitable manner. Because the property owners at The Point obviously have a significant stake in the outcome of this project, and will accrue ownership in any newly formed lands, the Town seeks your input and cooperation to address these concerns. You and any interested family members are invited to attend a special meeting with Town officials and consultants to address these matters on **Saturday, November 15, 2003 at 10:00 am at the Emerald Isle Town Hall**. I recognize that some owners may live a significant distance from Emerald Isle, but I urge you to consider making the trip to Emerald Isle for this meeting. The future of your properties adjacent to Bogue Inlet may depend on your input and cooperation on this matter.

Please call me at 252-354-3424 to discuss this matter if you are absolutely unable to attend this meeting. I will seek to gain your input via our telephone conversation to share with the other property owners who attend the meeting on November 15. As noted above, the Town would like to have a strategy for addressing these concerns within the next two months, and ideally sooner.

Please RSVP to me or Rhonda Ferebee, Town Clerk, at 252-354-3424 by Monday, November 10. I am also happy to answer any questions that you may have prior to the meeting, and you can call me at the same number during business hours at your convenience. The Town truly seeks your input and cooperation, and is fully committed to making this project a reality in November 2004. Please help us to make that happen.

Sincerely,

Frank A. Rush, Jr.
Town Manager

copy: Mayor Schools and Board of Commissioners
Derek Taylor, Town Attorney
Tom Jarrett, CPE
Mickey Sugg, US Army Corps of Engineers
Ted Tyndall, NC Division of Coastal Management
Greg Rudolph, Carteret County Shore Protection Office